Supreme Court, U.S.
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No. 95-786

In the
SUPREME COURT OF THE UNITED STATES
October Term 1995

CITY OF PORTLAND, a municipal corporation,
Petitioner,

v.

MICHELLE HUSSEY, JAMES HUSSEY, MARY FRAN MATHIS, JOHN RUTHERFORD, AND TERESA RUTHERFORD,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the consent of *electors* is required by state law for governmental action, may a municipality provide a substantial monetary benefit to individual electors in exchange for their consent?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

1. Respondents are residents of an area of Multnomah County, Oregon known as Mid-County. When this action was filed, Mid-County was outside the limits of petitioner City of Portland.

For environmental reasons, the State of Oregon, in 1986, required all Mid-County residents to connect to Portland's sewer system, and required Portland to permit Mid-County residents to connect to the municipal sewer system even though they were not city residents. Explicitly taking advantage of this opportunity to extend its boundaries, Portland enacted Ordinance 165188. The ordinance offered individual Mid-County electors a substantial reduction in sewer hookup costs in exchange for their irrevocable consent, in their capacity as *electors*, to annexation of Mid-County by petitioner.

Annexation, insofar as relevant to this case, can occur in Oregon only if a majority of *electors* within a given geographic

area consents to the annexation. The higher cost for nonconsenting electors to connect to the city sewer system was sufficient to cause financial hardship to them. Mid-County electors who oppose annexation, and thus refused to sign consents, are not eligible for the sewer hookup cost reduction even if they are subsequently annexed. The program was successful in obtaining the necessary consents, and, while this action was pending, portions of Mid-County were annexed to Portland.

The electors' consents are permanent[1] and irrevocable. In addition, they state:

> "In the event the type of annexation used involves a vote, **this agreement constitutes a waiver of the right to vote on the annexation** by persons who reside at the property if not the owner or owners who are qualified to vote on the annexation. Further, **such persons shall count as yes votes on the annexation.**"

(Emphasis added).

Individual electors who consented to annexation received the cost reduction, regardless of whether or when they were annexed. Electors who refused to consent did not receive the cost reduction, regardless of whether or when they were annexed.

2. Respondents challenged the program as a violation of their First and Fourteenth Amendment rights to speech and to vote and also as inconsistent with Oregon law. The Ninth Circuit held that Ordinance 165188 violates plaintiffs' voting rights, without reaching the free speech issues.

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[1]The consent form waived the statutory one year time limit on the consents of electors found in Or. Rev. Stat. 222.173. Appellant's Opening Brief to the Ninth Circuit Court of Appeals, Add-25.

The Court of Appeals focused on the unique aspect of Oregon law that requires consents to be provided by *electors* in addition to those required by property owners. The Court recognized that Oregon was plainly under no constitutional obligation to require any form of voting as a pre-condition to annexation. Nevertheless, the State's decision to employ consents given by *electors* in a manner that is "analytically like votes" cast by electors meant that both processes "legally must be treated" the same. Pet. App. 9.

The Court of Appeals then considered whether Portland could regulate the exercise of voting rights in the way it regulated the consent process. The Court analogized Portland's ordinance to a poll tax that is levied on the *content* of the voter's choice, and held that this would be manifestly unconstitutional. Accordingly, because Portland lacked a compelling justification for its effort to coerce votes for annexation and because Portland had constitutionally valid means available to induce support for annexation, the court below concluded that the ordinance was unconstitutional.[2]

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[2]In its previous opinion, which the Court withdrew in order to decide the constitutional issue, the panel held that Portland's ordinance was invalid under Oregon Revised Statutes 260.665, which prohibits giving anything of value to induce a person to "vote in any particular manner." The Court followed the reasoning it later employed on the constitutional issues in holding that the consents should be treated the same as votes under state law and thus the financial inducements offered by the State were unlawful. Pet. App. 14-20. The panel did not explain why it chose to decide the issue exclusively on constitutional grounds in its second opinion. Of course, if the Court were to grant review of this case, respondents would urge this state law ground as an alternative basis for affirmance. This provides an independent reason for the Court not to consider the issue posed by petitioner in this case.

REASONS FOR DENYING THE PETITION

Petitioner's hyperbole notwithstanding, the decision of the Court of Appeals is limited to the situation where a state chooses to place the primary annexation choice in the hands of registered voters. The Court's decision to treat such a choice as analytically similar to a "vote," and thus subject to the Fourteenth Amendment's reasonable constraints upon how a state may intrude into the voting process, is plainly a narrow decision. Moreover, it is a holding that conflicts with no decision of this Court or any other court. Indeed, the only decision that involves a government's attempt to purchase electors' consents reached exactly the same conclusion. See *Town of Fond du Lac v. City of Fond du Lac*, 22 Wis.2d 533, 126 N.W.2d 206 (Wis. 1964). Because of the narrowness of the holding, it will not meaningfully restrict future efforts by other jurisdictions to annex property. In short, the decision below presents no issue worthy of review by this Court, and therefore, the Court should deny the petition.

1. The Circuits are not divided on the issues decided by this case; no Circuit decision has confronted such a direct and egregious attack on voting rights.

In this case, Portland provided voters a substantial monetary benefit (approximately $2,000.00 to an "average" homeowner) for their permanent and irrevocable consent, in their capacity *as voters*, on a matter of public concern. Neither party has located any reported federal circuit or district court cases on this issue. No reported federal case has ever held that where a government action may be taken only with consent of electors, electors are not entitled to a full and free exercise of that consent.

The City argues that two cases challenging annexations through the consent of property owners "implicitly" decided "whether signing an annexation consent or annexation request form was the same as a vote." Pet. at 6-7, citing *Carlyn v. City of Akron*, 726 F.2d 287 (6th Cir. 1984), and *Berry v. Bourne*, 588 F.2d 422 (4th Cir. 1978). Neither case, however, presented the

issue raised here, whether the consent of *electors* on a matter implicated voting rights.

In *Berry*, the plaintiff challenged a South Carolina statute permitting annexation of an area upon the filing of a petition signed by at least 75% of the freeholders in the area. The plaintiff argued that the statute, by providing a vote to *property owners* but not voters, violated voters' rights to equal protection. In *Carlyn*, the City of Akron annexed contiguous property pursuant to an Ohio statute providing that annexation could be ordered by a county commission upon the request of petitioning property owners. 726 F.2d at 289. The *Carlyn* plaintiffs challenged an annexation initiated by *property owners*, arguing that their lack of a vote violated equal protection.

Both courts held that no violation of voting rights had occurred because the consent of the *property owners, in their capacity as property owners*, were not votes. They reached this result because the annexations also depended on the consents of a government body. The *Berry* and *Carlyn* courts needed only to decide whether the consent of the property owners, in their capacity as property owners, were the equivalent of votes. To be sure, those courts reasoned that the necessity of governmental action after *property owner consents* meant the consents were not "votes." While the Ninth Circuit expressly disagreed with this logic, pointing to bond issues and the electoral college as examples to the contrary, this disagreement is purely academic.

The Ninth Circuit was faced with a different question: where the consent of *electors, in their capacity as electors,* is required for governmental action, may a government provide a substantial monetary benefit to individual electors in exchange for their consent? In addressing the issue, the court explicitly agreed with the results of *Berry* and *Carlyn*. The Ninth Circuit refused to extend the reasoning of those cases to the decisions of *electors*, and concluded that the electors' consents in this case are votes.

There is no conflict between the circuits on the issue posed by the *holding* below.

A great deal of petitioner's policy argument is based on a steadfast disregard of the Court of Appeals' basic holding. While claiming extravagantly (Pet. 18-23) that the Court of Appeals' analysis will hamstring the ability of all states and municipalities to pursue innovative forms of annexation and thus will discourage any efforts to democratize the annexation process, Portland briefly owns up to the "determining factor" in this case. This is the unique requirement in Oregon that registered voters must provide the consents, and in Portland that consents may be purchased. Thus, as Portland concedes, the decision below does not affect any annexation scheme that does not place the decision squarely in the hands of "voters."[3]

Portland's entire argument thus reduces to urging this Court to adopt the City's *ipse dixit* that "not every expression of position

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[3]Petitioner cites sections of the annexation statutes of 24 states which it erroneously claims will be affected by the decision of the Ninth Circuit. Pet. 19 n. 9. In fact, Petitioner cites no statute or ordinance which, like the one at issue here, permits a government to purchase needed individual consents to annexation from electors. The holding below attacked Portland's ordinance, not Oregon's annexation law.

Respondents have reviewed the 24 statutory sections petitioner cites. Those sections reveal diverse approaches to annexation, but only a few of the cited sections refer to electors, and only two require the consent of a majority of electors for annexation. Of the statutory sections cited, only those of Illinois and New Jersey arguably require the "consent of the governed" for annexation as under Oregon law. Pet. App. 9. The cited Illinois and New Jersey statutory sections permit annexation only after a majority of electors petition for that annexation. Ill. Rev. Stat. Ch. 65 § 5/7-1-2 (1995); N.J. Rev. Stat. § 40A:7-12 (1994).

Thus, the holding of the Ninth Circuit would affect only those few states that require the consent of a majority of electors for annexation, and only to the extent that it would prevent annexing bodies from paying electors for their consents.

on public issues by an elector is a vote." But, even if that proposition is correct (which Portland makes no effort to prove), it still overstates the holding below because the Court of Appeals did not even adopt this modest principle of law. It merely held that actions by electors in Oregon's annexation statute are analytically similar to votes. That inherently case-bound ruling is both reasonable and plainly not worthy of review by this Court.

2. The issue presented by this case is extremely rare, and there is *no* disagreement between cases addressing that issue.

The parties have located only one reported case, besides this one, dealing with the individualized purchase of electors' consent. *Town of Fond du Lac v. City of Fond du Lac*, *supra*, concerned the City of Fond du Lac's attempt to annex 188 acres of land. In order to obtain the signatures of tenant *electors* living there, the city used economic incentives (a year of free rent) and disincentives (the threat of eviction). The Wisconsin Supreme Court held that the right of an *elector* to participate in an annexation proceeding is analogous to voting on the question. 126 N.W.2d at 204 (1964). The court noted that "the signing of an annexation petition, like voting, constitutes participation in a governmental process" which is "governed by a higher standard of conduct than prevails in the marketplace -- votes are not a commodity of commerce." *Id.* Accordingly, the court struck down the annexation attempt. The Ninth Circuit correctly cited this case with approval.[4]

Portland cites three other cases in support of its position. None of these cases is inconsistent with the result of the Ninth Circuit here. Rather, each of the cited cases deals solely with the

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[4]The Ninth Circuit also referred to *Curtis v. Board of Supervisors*, 7 Cal.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 (1972), in which a statute allowing property owners to prevent an election on annexation was subjected to strict scrutiny because it touched upon the right to vote.

question of whether annexation (or in one case, de-annexation) petitions are equivalent to "votes."

Willows v. City of Lewiston, 461 P.2d 120 (Idaho 1969) held that annexation consents of *property owners, in their capacity as property owners*, are not equivalent to votes under the Idaho Constitution. As noted above, the Ninth Circuit explicitly approved a similar conclusion as to the federal Constitution as set out in *Berry* and *Carlyn*.

In *Township of Jefferson v. City of West Carrolton*, 517 F.Supp. 417 (S.D. Ohio 1981), *aff'd* 718 F.2d 1099 (6th Cir. 1983), an Ohio annexation statute provided that one means of annexation was by a petition by a majority of landholders in the affected area. The plaintiffs sought application of voting rights to the property owner consent process under due process and equal protection grounds, because other methods of annexation in Ohio were based on elections. The court disagreed, holding that the consent of *property owners* is not equivalent to the consent of electors under other Ohio annexation methods because the consents are not the final acts triggering annexation. 517 at 421. The Ninth Circuit would disagree with this reasoning, but agree with the result.

Town of Falls Church v. County Board of Arlington County, 184 S.E. 459 (Va. 1936), involved a judicial de-annexation process in Virginia. The statute required that a petition for de-annexation be signed by a majority of the qualified voters in the affected area, and then presented to a court for approval. Standards for de-annexation were spelled out in the statute, and included, *inter alia*, a requirement that the court find the "general good of the community will not be affected" by the proposed de-annexation. 184 S.E. at 463. The court held that the filing of a judicial petition [i.e., complaint] is not an election. The court did not consider whether federal voting rights were implicated; the issue apparently was never raised. The petition had to be served on the annexing body and notice provided to the "residents or freeholders"

of the affected area, any of whom could intervene in the action. 184 S.E. at 464. The court held that the petitions to begin this judicial process were not part of an election within the meaning of the Virginia Constitution.

In sum, the only two courts which have considered the precise matter raised here are in agreement that where electors, as electors, are required to consent to municipal annexation, they may not be paid for their consents. The issue has rarely been contested, and is not a recurring one.

3. This case, in which Portland paid individual electors approximately $2000.00 for their votes, does not present a close question; the opinion of the Ninth Circuit is plainly correct.

Portland argues that the consent of electors is not a vote because the final outcome of the issue was not immediate and depended on another entity. As the Ninth Circuit noted, Portland's definition of "vote" excludes presidential races (where the outcome depends on the electoral college), and municipal bond elections (where voter approval does not require issuance of the bonds). Nor should the length of time, or the fact that a traditional election[5] was not subsequently held make any difference; Portland has purchased the permanent proxy of some Mid-County electors. Even if those proxies are never used, they were obtained wrongfully.

This case is not about the mere extension of financial aid to some future city residents. As the Ninth Circuit noted, the ordinance adopted by Portland "severely and unreasonably interferes" with voting rights. App-11.

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[5]Oregon is not wedded to the traditional voting booth. The state uses extensive mail balloting (mailed to voters 14 to 20 days before they are due), and extensive use of absentee ballots (mailed up to 45 days before the election). Or. Rev. Stat. 254.465, 254.470; 253.045(1), 253.065(1).

> "But unlike a poll tax, which applies regardless of how a voter casts his ballot, this subsidy is conditioned on how an elector votes. In this way, the Portland ordinance is even more distorting than a poll tax." App-11.

Portland makes no effort to argue that its action would be permissible if an actual election were conducted. This is because such an interference with voting is unquestionably unconstitutional. Thus, the only issue is whether Oregon's electoral annexation procedure is like a vote, and that issue does not warrant further review.

4. No Tenth Amendment issue was raised below, and in any event, is not presented by this case.

Portland argues that interference with its purchase of individual electoral consents violates the Tenth Amendment. This argument was never raised below, and need not be considered by this Court. "Ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Portland argues that deciding what is or is not a vote is a matter left to the states under the Tenth Amendment. Even if that were true, by explicitly requiring the consent of electors, Oregon made that decision and, by adopting a process "analytically like" voting, the state chose to subject the process to federal constitutional protection designed to protect voting. This Court has long held that once a state provides an opportunity for a vote on an issue, the vote is constitutionally protected. *Kramer v. Union Free School Dist.*, 395 U.S. 621, 628-9 (1969). If that guarantee has any meaning at all, a court must be able to look behind the label to determine whether the act is a vote or its equivalent. As the Ninth Circuit pointed out below, labelling cannot be dispositive; otherwise a state could evade laws protecting voters merely by declaring that elections would be decided through collecting

"consents." Pet App 6. In any event, Oregon specifically chose a system which included the consent of "electors."

As explained previously by the Court of Appeals, there are numerous methods available to the state to provide for annexation without raising serious constitutional issues, and there are methods available to Portland that trigger none of the concerns present in this case. Under these circumstances the modest restrictions placed upon the local jurisdictions' options hardly presents a serious Tenth Amendment problem. Certainly, this is not a suitable vehicle for considering the scope of the Tenth Amendment.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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